

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 6, 2007

**STATE OF TENNESSEE v. JAMES D. BEAIRD**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2004-B-1800     Mark J. Fishburn, Judge**

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**No. M2006-01931-CCA-R3-CD - Filed February 15, 2008**

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The defendant was convicted by jury of attempted especially aggravated robbery and first degree felony murder. For his convictions, he received sentences of twelve years and mandatory life imprisonment to be served consecutively. In this appeal, the defendant presents four issues for review: (1) whether the evidence was sufficient to support his convictions; (2) whether the trial court erred in admitting a tape recording of a 911 call the victim's mother made to police; (3) whether the trial court erred in admitting testimony that the victim was fatally shot on his mother's birthday; and (4) whether the trial court erred in sentencing. Finding no errors requiring reversal, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and J. CURWOOD WITT, JR., JJ., joined.

Jeffrey A. DeVasher (on appeal) and Clark B. Thornton and Jason Gichner (at trial), Assistant Public Defenders, Nashville, Tennessee, for the appellant, James D. Beaird.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND**

The following evidence was presented at the defendant's trial. George McLaurine, Jr., the victim, was shot and killed at his home on the evening of March 25, 2004. The victim's mother, Mrs. McLaurine testified that her son, the victim, came home and gave her a gift and card for her birthday on March 25, 2004. Around 7:00 p.m., the victim, while talking on his cell phone, stopped and told Mrs. McLaurine that he was leaving the house. Mrs. McLaurine heard the door slam and

then she heard gunshots. Mrs. McLaurine went over to the window and saw a man with the victim. The man was “shooting down at the ground.” At this time, Mrs. McLaurine ran out of the house onto the front porch and asked the man, “Why are you shooting at my son?”

Mrs. McLaurine testified that the man told the victim to take off his pants. She did not understand the man’s request, and again, told the man not to hurt her son. The man then pointed the gun at her and told her, “[Y]ou better get back in the house or I will shoot you.” The victim then walked towards the house and said, “Momma, go back in the house, go back in the house.” According to Mrs. McLaurine, everyone went back into the house including the gunman. At one point, she was able to get a good look at the man as he stood underneath the porch light. The man kept the gun pointed on them as he walked into the house. Mrs. McLaurine recalled that she stood in front of the victim and asked the man not to shoot her son. However, when the man pointed the gun at her and said he would kill her, the victim intervened and pushed her behind a door to the den and closed the door. Mrs. McLaurine then heard her husband tell the victim to take off his pants and give them to the man. She then heard another gunshot. Mrs. McLaurine returned to the front room and saw the victim lying on the floor “gasping for breath.” Her husband told her to call 911 and then he ran outside after the man. Mrs. McLaurine called 911 and told the dispatcher what happened. The victim was rushed to the hospital, but he died shortly thereafter.

Mrs. McLaurine testified that she told the police what happened. She told the police that the gunman had been wearing a pullover jacket with a zipper on the front and a hood pulled over his head. However, she had been able to see his eyes, and they were slanted. Mrs. McLaurine told police that the gunman looked like “Kenny,” a person she knew when she worked as a substitute teacher at Whites Creek High School about four years before. She also told the police that her son had been on the phone as he left the house. Later, the police showed her several photographic lineups with about six separate photographs of individual suspects in each lineup. She looked at them and told the police that some of the photographs resembled the gunman, but “they were not him.” The police also showed her a picture of “Kenny.” However, after looking at Kenny’s photograph, she told police that Kenny was not the gunman. Eventually, Mrs. McLaurine was shown a photographic lineup with the defendant’s photograph included in the lineup. She testified that the defendant’s picture was number four in the lineup and that she positively identified the defendant as the gunman. She also identified the defendant in court as the gunman and stated that she had no doubt that the defendant was the man who shot her son.

On cross-examination, Mrs. McLaurine acknowledged that she was shown a lot of photographs of potential suspects. She further acknowledged that she selected photographs of individuals other than the defendant who “looked like the [gunman]”; however, she denied identifying them as the gunman. She also denied becoming confused and said, “I looked at him [the gunman] directly in his face. When he had the gun pointed at me, I looked at him directly in his eyes . . . I could identify him.”

George McLaurine, Sr., the victim’s father, testified similarly about the events that occurred the evening of March 25, 2004. Mr. McLaurine recalled that the victim was on his cell phone then

left the house through the garage. About ten seconds after the victim left, "some shots rang out." Mr. McLaurine followed his wife out the front door to investigate. He saw a man holding the victim at gunpoint and heard his wife tell the man to not shoot her son. Everyone was ushered back inside the house, and as they entered the house, the man turned the front porch light off. While walking into the house, the man was saying, "I'm going to kill him, I[m] going to kill him." Once inside the house, Mrs. McLaurine moved in front of the victim. The man responded, saying "if you don't move, I'm going to shoot you, too." As a result, the victim pushed Mrs. McLaurine back behind Mr. McLaurine and into the den.

According to Mr. McLaurine, the man told the victim to take off his pants, and Mr. McLaurine urged his son to comply. The victim took off his pants and threw them towards the man. "About that time a shot rang out and [the victim] hit the floor." Mr. McLaurine knelt down by the victim, and, as his wife came in from the den area, he told her to call 911. Mr. McLaurine then ran after the gunman in an attempt to catch him. Mr. McLaurine recalled that his son was shot in the head. Mr. McLaurine also recalled that the gunman was wearing a dark-hooded jacket with only his face showing. Mr. McLaurine said he saw the gunman's face, but he did not recognize him.

Mr. McLaurine testified that he viewed a number of photographs from the police. Although he narrowed his identification down to two men, he was unable to positively identify the gunman from the photographs. However, Mr. McLaurine noted that he positively identified the defendant as the gunman at the preliminary hearing, and he identified the defendant in court as the gunman. On cross-examination, Mr. McLaurine admitted that the defendant was the only individual in prison attire and handcuffs at the preliminary hearing. On re-direct, Mr. McLaurine maintained that the defendant was the man who shot his son.

Police Officer Jessie Loy of the Metropolitan Police Department testified that he responded to the shooting at the McLaurines' residence. Upon arrival, he observed that the victim had been shot in the head and was lying inside the doorway of the residence. Officer Loy recalled that he was present when the ambulance arrived to transport the victim to the hospital. Officer Loy secured the scene and notified the homicide division. He got a description of the gunman from the victim's father and placed a Be On the Look Out (BOLO) alert for the gunman. According to Officer Loy, the gunman was described as a black male, approximately 5'6" to 5'9" with a slim build and a moustache. The gunman was wearing a hooded black and red coat and blue jeans.

Several police officers testified regarding their role in securing the crime scene and the recovery, collection, and testing of the physical evidence. According to their testimony, the evidence found at the scene was photographed, collected, sealed, labeled, and taken to the property room at the police department. Among the evidence collected were Winchester .9 Luger shell casings and fragments, a copper jacketed projectile, and a pair of pants. The shell casings and fragments were tested and determined to have been discharged from the same weapon whose whereabouts were unknown. Several photographs, the ballistics report, and a diagram of the crime scene were entered as exhibits and shown to the jury.

Police Detective Charles Robinson of the Metropolitan Police Department testified that he participated in the investigation of the victim's homicide. He and other detectives began their investigation the day after the victim was shot. After speaking with the victim's parents, Detective Robinson learned that the victim had been speaking with someone on the phone when he left the house. Detective Robinson obtained the victim's cell phone and documented all of the incoming and outgoing phone calls. The last phone number listed in the victim's phone was later determined to be a number for Shayla Bryant. According to Detective Robinson, he and other detectives talked to eight or ten people in an effort to figure out who might be involved in the victim's homicide.

Detective Robinson testified that he showed the victim's parents numerous photographic lineups in attempt to identify the gunman. The first photographic lineup included a photograph of an individual named Kenny because Mrs. McLaurine had previously told him that she thought she knew the gunman because he was in one of her classes she taught as a substitute teacher. However, when viewing the photographic lineup, Mrs. McLaurine was unable to positively identify Kenny as the gunman even though she recognized Kenny's photograph as the individual whom she taught at the high school. Mr. McLaurine also did not identify anyone as the gunman from the first photographic lineup. Likewise, Mr. and Mr. McLaurine failed to identify the gunman from a second photographic lineup shown to them later on the same day.

Detective Robinson testified that he showed the McLaurines additional photographic lineups on March 27 and 30, 2004, and again, no identification was made. According to Detective Robinson, none of the photographic lineups at the time contained a picture of the defendant. Detective Robinson recalled that on March 29, 2004, the McLaurines were shown a couple hundred photographs from a police computer. At this time, Mrs. McLaurine picked out photographs of two men and explained that they looked similar to the gunman, but that they were not the individual who shot her son.

Detective Robinson testified that during the course of the investigation, he and other police detectives interviewed Shayla Bryant several times. They had confirmed that Bryant had talked to the victim the night he was shot. Although Bryant initially denied being involved in the shooting, she eventually admitted involvement and told detectives that the gunman was a man known to her as "Manny Fresh." Thereafter, she was asked to give a statement and look at some photographs in attempt to identify "Manny Fresh." Bryant identified the defendant's photograph as the individual known as "Manny Fresh." Subsequently, Detective Robinson showed the McLaurines another photographic lineup with the defendant's photograph included in the lineup. At this time, Mrs. McLaurine, without hesitation, identified the defendant as the gunman. Mr. McLaurine, however, did not identify anyone from this lineup. According to Detective Robinson, several robberies took place in 2004 where the victims were ordered to take their pants off. It seemed at the time to be "a fad that every robber would use."

On cross-examination, Detective Robinson confirmed his notes which indicated that Mrs. McLaurine picked photographs of two individuals on March 29, 2004, who closely resembled the suspect. Detective Robinson acknowledged that he interviewed other individuals as persons of

interest or suspects during his investigation, including Shayla Bryant's cousin, Latron Bryant. However, Detective Robinson recalled that Latron Bryant did not fit the physical characteristics of the gunman as described by the victim's parents. Latron Bryant was "about 75 pounds heavier than what they had described, so I didn't view him as a serious suspect at all." Detective Robinson recalled that he had many interviews with Shayla Bryant and she had said many things which were proven to be untrue; however, some information was checked out and proven to be accurate. After Detective Robinson's testimony, a stipulation was entered into evidence establishing that the defendant was at Whites Creek High School during the 1998-99 school year and the first part of the 2000 school year.

Dr. Bruce Levy, the Chief Medical Examiner for the State of Tennessee, testified that the victim's autopsy revealed that the victim suffered a gunshot wound to the right front portion of his head and died as a result. Based on the gunpowder and debris in and around the victim's wound, Dr. Levy estimated that the gun was fired between six and twenty-four inches from the victim. Dr. Levy declared that the manner of death was a homicide. Dr. Levy also noted that the victim had a small laceration along his left eyebrow, which could be consistent with being pistol whipped. Dr. Levy's autopsy report was introduced into evidence.

Shayla Bryant testified that she had been charged with first degree felony murder and especially aggravated robbery as a result of her involvement in the shooting death of the victim. According to Bryant, she became friends with the victim in 2003 and later dated the victim. During the course of their friendship, the victim would from time to time borrow Bryant's car because his car was in the shop for repairs. On one particular occasion in February, the victim became involved in an automobile accident and wrecked Bryant's car. It cost about \$2,800 to repair Bryant's car, and the victim promised that he would pay for the repairs. At the time, the victim did not have the money to repair Bryant's car so he suggested that Bryant give him some money to fix his car because his car needed less money for repair. In return, he would drive Bryant back and forth to work until he could save enough money to repair her car.

Bryant testified that she agreed to pay to fix the victim's car and that the driving arrangement worked for about two weeks. However, the victim soon became tired of being a chauffeur for Bryant and told her that she was getting on his nerves because he had to stop doing what he was doing to drive her places. According to Bryant, she and the victim argued over their driving arrangement.

Bryant testified that she called the victim on March 24, 2004, to remind him to pick her up for work the next morning. However, the following morning, the victim did not pick Bryant up as planned, and as a result, she lost her job. Later that day, she got in touch with the victim and asked him why he had not taken her to work and her son to school. He replied that he had been asleep. As a result, they argued. According to Bryant, she was angry because she lost her job. She asked the victim why he did not get her car out of the shop when "he had the money to get my car out of the shop and if he did that we wouldn't have this problem." She then asked the victim to come get her and take her to the store. The victim told her he would be there in fifteen minutes but arrived two hours later, thus inciting another argument.

Bryant testified that while waiting on the victim to come pick her up, she went over to her neighbor's house and began "calling around to see if someone would take [her] to the store . . . [and] just so happened, to call [the defendant]." Bryant recalled that she had been introduced to the defendant in 2002. While she only knew the defendant by his nickname, "Manny Fresh," she was friends with the defendant and had called him about every day up until the day of the shooting. While talking to the defendant, Bryant complained about her situation with her car. In response, the defendant said, "I told you to let me holler at him." Bryant explained that the defendant's use of the word "holler" meant to "rob." Bryant told the defendant that she was not comfortable with robbing the victim and that she would call the defendant later. After the victim arrived at her place, he drove her to her uncle's house. Bryant then borrowed her uncle's car and cell phone and agreed to follow the victim to his parent's house where he would give her \$1,050 towards the car repair bill he promised to pay.

Bryant testified that while en route to the victim's house, she called the defendant. She told the defendant that the victim was going to give her part of the money owed to fix her car, and the defendant suggested that she pick him up and that he would get the rest of the money for her. So she took a detour and picked up the defendant. Thereafter, Bryant told the defendant that "when he [the victim] come and give me the \$1,050 just draw down on him and take the rest of [the money], he's gonna know I did it anyway." Bryant explained that "draw down" meant that the defendant was going to pull a gun on the victim. In response, the defendant told Bryant that he did not like her plan. Bryant recalled:

He was like, no, we ain't going to do it like that, just drop me off about four or five houses down the street and you go back and park in front of the house and leave the lights on and I will walk up beside the house and I will wait until he come out and you pull off and then I jump out on him and scare him and take the rest of the money.

Bryant testified that she dropped off the defendant a few houses down from the victim's house, at which time she first saw the defendant's gun as he pulled it out, "cocked it," and put it back in his waistband. Bryant then drove to the victim's house, parked outside, and called the victim to tell him that she was outside. The victim then came outside, gave her \$1050, and asked her if she was "straight." Bryant said she was fine and told the victim to call her later. While she and the victim were talking, the defendant called Bryant's cell phone and asked her if the person she was talking to was the victim. According to Bryant, she tried to play it off by telling the defendant she would call him right back. However, after she pulled away from the victim's house and started driving down the road, she heard gunshots. Bryant claimed that she tried to call the defendant to see why he was shooting but that the defendant did not answer his phone.

Bryant testified that after hearing the gunshots she got scared and started to drive home. At this time, the defendant called her. According to Bryant, the defendant was vomiting and said, "[H]e had been shot." Bryant headed back to pick up the defendant. When she reached him, he told her

that he was not shot, but that he shot the victim and believed him to be dead. When asked why the victim was shot, the defendant told Bryant that he shot the victim because “he wouldn’t give me the money.” Bryant said, “[Y]ou didn’t have to shoot him” and told the defendant she would call the police on him. In response, the defendant pointed his gun at her and told her that he would kill her and her kids if he got in trouble. Bryant claimed that she was scared because the defendant had just killed her friend.

Bryant testified that she gave the defendant \$20 for drugs then dropped him off at an apartment complex. She explained that earlier at her uncle’s house, the defendant had agreed to get the money from the victim if she would buy him some “weed”. At the time, she had agreed and told the defendant that he could keep any extra money taken from the victim. She then drove back to the victim’s house and talked to Mrs. McLaurine. She already knew the victim was dead because she had received a phone call from her mom telling her about the shooting. The next day, Bryant went to the auto shop with the money the victim had given her the night before in attempt to get her car out of the shop. Bryant acknowledged that she had sex with the defendant one time but maintained that they did not have a relationship.

On cross-examination, Bryant acknowledged that she had lied to the police on several occasions, especially about her involvement in the victim’s death. She acknowledged that she told police that the victim sold drugs and that someone might have killed the victim over some fake drugs sold by the victim. However, Bryant insisted that her testimony at trial regarding the circumstances surrounding the victim’s death was the truth. Bryant also asserted that she had never named anyone other than the defendant as the perpetrator. Bryant claimed that she lied to police because the defendant had threatened to kill her, but she decided to tell the truth because her conscience was bothering her. She acknowledged that she was hoping to get some kind of deal from the state for her testimony against the defendant.

Mrs. McLaurine was recalled to testify. She stated that she knew Shayla Bryant’s cousin, Latron Bryant. He had been at her house before and was at the hospital after the victim was shot. Mrs. McLaurine asserted that Latron Bryant did not resemble the gunman who shot her son. Eric Duton testified as the custodian of records for the Metro Emergency Communications Center. She identified the tape relating to Mrs. McLaurine 911 call. The 911 tape was introduced into evidence and played for the jury. Also admitted into evidence was a stipulation that a bag containing two rocks of cocaine and plastic sandwich bags were found in the victim’s bedroom.

Following deliberation, the jury found the defendant guilty of attempted especially aggravated robbery and first degree felony murder.

## **ANALYSIS**

### **I. Sufficiency of the Evidence**

The defendant first challenges the sufficiency of the evidence. In particular, he argues that the evidence was insufficient to establish his identity as the gunman. He also argues that the testimony from accomplice, Shayla Bryant, was not corroborated and thus insufficient to support his convictions.

Our review begins with the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); see Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

Addressing the defendant's challenge to the sufficiency of the evidence as it relates to his identity, we note that the identity of an accused may be established by either direct evidence, circumstantial evidence, or a combination of the two. *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975). "The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made." *State v. Radley*, 29 S.W.3d 532, 537 (Tenn. Crim. App. 1999). Identity is a question of fact for the jury to determine after consideration of all the evidence. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993).

Upon review, we conclude that the evidence was sufficient to establish beyond a reasonable doubt that the defendant was the perpetrator of the crimes. Both of the victim's parents, Mr. and Mrs. McLaurine, testified that they saw the defendant's face at close proximity. Mrs. McLaurine positively identified the defendant as the gunman from a photographic lineup prior to trial. Mrs. McLaurine also told police immediately after the offense that the gunman resembled someone she had taught at Whites Creek High School. Records confirmed that the defendant was a student at this high school during the time Mrs. McLaurine taught there. In addition, both Mr. and Mrs. McLaurine positively and unequivocally identified the defendant at trial as the man who shot their son. Furthermore, the McLaurines' identification was corroborated by Shayla Bryant's testimony. Bryant testified that the defendant offered to rob the victim for her and, during the robbery, shot and killed



the victim. The jury heard the testimony at trial and by its verdict accredited the witnesses' identification testimony. Accordingly, the proof of the defendant's identity as the perpetrator of the crimes was sufficient, and he is not entitled to relief on this issue.

The defendant also argues that there was insufficient corroboration of accomplice Shayla Bryant's testimony. In particular, the defendant challenges Shayla Bryant's testimony that the defendant killed the victim in perpetration of a robbery. Upon review, we note that a conviction cannot be based solely upon the uncorroborated testimony of an accomplice. *State v. Bane*, 57 S.W.3d 411, 419 (Tenn. 2001). As aptly explained by our supreme court:

[t]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's [testimony].

*Shaw*, 37 S.W.3d at 903 (quoting *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994)). However, independent evidence, though slight and entitled to little weight when standing alone, is sufficient to corroborate accomplice testimony. *State v. Heflin*, 15 S.W.3d 519, 524 (Tenn. Crim. App. 1999). The sufficiency of the corroboration is a determination for the jury. *Shaw*, 37 S.W.3d at 903.

In the present case, Shayla Bryant testified that the victim owed her money and that the defendant offered to rob the victim of the money owed. The defendant accompanied Bryant to the victim's house, ordered Bryant to drop him off a few houses away from the victim's house, and told Bryant he would get the rest of the victim's money after the victim met with Bryant. The victim met Bryant outside, and he gave her \$1,050. While the victim and Bryant were talking, the defendant called Bryant to confirm the identity of the victim. After Bryant drove away from the victim's house, she heard gunshots. Later, the defendant informed Bryant that he shot the victim and believed him to be dead. The defendant told Bryant that he shot the victim because the victim would not give him the money. Bryant's testimony was corroborated by Mr. and Mrs. McLaurine's identification of the defendant as the man who shot and killed the victim. Consequently, sufficient corroborative evidence exists to uphold the defendant's convictions. The defendant is not entitled to relief on this issue.

## **II. Admission of the 911 Tape**

The defendant next contends that the trial court erred in admitting the audiotape of the 911 call the victim's mother made to police immediately after the victim was shot. Specifically, the defendant argues that the 911 tape was not relevant or, in the alternative, that the probative value of

the tape was substantially outweighed by the danger of unfair prejudice to the defendant. In rebuttal, the state argues that the 911 tape was properly admitted because it was relevant to establish what occurred at the crime scene after the victim was shot, and it corroborated part of Mrs. McLaurine's testimony involving her description of the shooter.

Prior to trial, the defendant filed motions *in limine* to exclude the 911 tape on the grounds that it was inadmissible hearsay and not relevant to any fact at issue at trial. In the alternative, defendant asked the court to redact certain portions of the tape where the victim's mother can be heard crying, praying, and pleading that her son not die from the gunshot wound he sustained. The defendant argued that the probative value of certain portions of the audiotape were substantially outweighed by the danger of unfair prejudice. Following a hearing on the matter, the trial court ruled that the entire 911 tape was admissible. The court explained that identification of the perpetrator was a key issue in the case. The court then stated the following:

The 911 tape, I believe, gives the jury some insight as to Mrs. McLaurine's mental and emotional state immediately after the events, which I further believe is relevant to measure her capacity to properly and accurately recollect not only what she saw but how she was able to process that information in making her identification.

The Court finds that her mental and emotional state cannot be adequately replicated in the courtroom for the jury to fairly assess these qualities and, therefore, the 911 tape is probative of these issues as to her mental and emotional state and it is not substantially outweighed by its prejudicial affect. So I am going to allow the 911 tape to be introduced.

As previously noted, Mrs. McLaurine, the victim's mother, testified in great detail at trial about the events surrounding the shooting death of her son. She testified:

My husband ran out the door after the guy and he said, Willie Mae, call 911. I got on the phone and I called 911, and I told them what had happened. Then when they came to get my son, they took him. . . . I prayed all the way to the hospital.

I was asking the Lord not to let George [the victim] die, and then when we got to the hospital we sat in the waiting room and then they came back and told me that George was dead . . . .

Thereafter, at the end of the state's case-in-chief, the 911 tape was admitted into evidence and played for the jury.

We have reviewed the 911 tape. On the tape, Mrs. McLaurine reports that her son had been shot in the head and later describes the shooter as a young black male wearing black clothes. However, she is understandably distraught and can be heard as follows:

[Mrs. McLaurine crying] Please help me, help me. . . . George hold on please.

. . . .  
[O]h, Lord, please, please God. . . . Please, Lord. Please, God. Oh, thank you Jesus. Oh, please Jesus. Please, please Jesus don't let nothing happen to my child. Oh, Jesus, Jesus.

. . . .  
. . . Oh, oh, please, please . . . [crying] Why Jesus, Jesus, Jesus, Jesus, Jesus . . . Oh, Lord

. . . .  
[crying] Jesus, Jesus, Jesus, Jesus, Jesus . . . Oh, please.

. . . .  
. . . [crying] Oh, Lord. Have mercy, please. Have mercy on us. Have mercy.

. . . .  
. . . Hold on George. Hold on George. Hold on. Hold on. [starts crying].  
. . . They were arguing and I told him not to shoot my son. . . . Oh, George, George, please, please, hold on. Don't die. . . .

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. Relevant evidence is generally admissible. Tenn. R. Evid. 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of delay, waste of time, or needless presentation of cumulative evidence. Tenn. R. Evid. 403.

Upon review, we do not see how the admission of the 911 tape was particularly relevant to the state's case-in-chief, given that the information on the tape had already been imparted through the testimony of the state's witnesses. At most, the 911 tape was marginally probative of the defendant's identity as a black male wearing black clothes. In contrast, the 911 tape was prejudicial to the defendant as it contained emotional outpourings of the victim's mother in the aftermath of a violent crime. Moreover, Mrs. McLaurine testified to virtually everything contained on the 911 tape, including the identification of the defendant. In this respect, the evidence was cumulative. Therefore, the 911 tape should have been excluded because its marginal probative value was substantially outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence. *See* Tenn. R. Evid. 403. Accordingly, the trial court erred in admitting the 911 tape.

Notwithstanding the trial court's error, we determine the error to be harmless. Generally, an error in the admission of evidence does not amount to reversible error unless the error “affirmatively appear[s] to have affected the result of the trial on the merits.” Tenn. R. Crim. P. 52(a). While the 911 tape was prejudicial, it was not so inflammatory as to require reversal. In this case, the evidence at trial clearly established the identity of the defendant as the man who shot and killed the victim.

Moreover, the trial court instructed the jury not to bring emotion, prejudice, or sympathies into the deliberation process, and the jury is presumed to follow the court's instructions. *See generally State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004). Therefore, we conclude that the trial court erred by admitting the 911 tape, but the error was harmless in that it did not undermine the fundamental fairness of the defendant's trial. The defendant is not entitled to relief on this issue.

### **III. Relevance: Victim's Mother's Birthday**

The defendant next argues that the trial court erred by allowing testimony that the offenses occurred on the birthday of the victim's mother.

Prior to trial the defendant filed a "Motion to Prohibit Testimony Tending To Appeal to the Jury's Sympathy." In the motion, the defendant specifically requested that the trial court prohibit any witness from testifying that the victim's homicide occurred on the birthday of his mother, Willa Mae McLaurine, because such testimony was not relevant and posed a danger of unfair prejudice to the defendant.

After hearing the arguments of counsel on the issue, the trial court ruled as follows:

I'm going to allow her to testify that [the shooting] was on her birthday because it goes to the overall story of the events occurring on that day. I do not want the State, in closing arguments, to be pounding home that fact.

I can see where that [testimony] plays to the emotions of the jury but it is a factual part of the events that day, and it is probably a necessary fact to explain what was going on that day. And in closing, I don't want the State to use that to play on the juror's sympathy . . . .

Admission of evidence is governed by the Tennessee Rules of Evidence. We review the trial court's ruling on this evidentiary matter under an abuse of discretion standard. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997). An abuse of discretion is shown if the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

Upon review, we discern no abuse of discretion by the trial court in allowing Mr. and Mrs. McLaurine to reference the fact that the shooting occurred on Mrs. McLaurine's birthday. As the trial court noted, the testimony was relevant because it explained why the family was together that evening and placed the events of the shooting in context. Additionally, the testimony of the McLaurine's regarding this fact was brief and not particularly emotional. The record shows that the trial court complied with the procedural prerequisites for admission of the evidence and determined that the probative value of the limited evidence was not substantially outweighed by the danger of unfair prejudice to the defendant. Tenn. R. Evid. 403. The court also imposed limitations on the state designed to ameliorate any possible prejudice to the defendant. The court further instructed the jury to have "no prejudice or sympathy, or allow anything but the law and the evidence to influence [their] verdict." Accordingly, the defendant is not entitled to relief on this issue.

#### **IV. Sentencing**

The defendant next contends that his sentence is excessive. Specifically, the defendant argues that the trial court improperly applied enhancement factors to increase his sentence for attempted especially aggravated robbery contrary to the dictates of *Blakely v. Washington*, 542 U.S. 296 (2004) and *Cunningham v. California*, --- U.S. ----, 127 S.Ct. 856 (2007). He also argues that the court erred by ordering consecutive sentences.

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210(f).

#### ***Sentence Length***

The defendant was convicted of attempted especially aggravated robbery, a Class B felony. The trial court determined the defendant to be a Range I, standard offender, subjecting him to a possible sentence of eight to twelve years. *See* Tenn. Code Ann. § 40-35-112 (2003). The trial court then imposed a sentence of twelve years based on its finding of the following enhancement factors:

- (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) the defendant was a leader in the commission of an offense involving two or more criminal actors; (3) the defendant had no hesitation about committing a crime when the risk to human life was high; and (4) the defendant was on probation at the time he committed the felony in this case.

*See, e.g.*, Tenn. Code Ann. § 40-35-114 (1), (2), (10), (13) (2005).

Effective June 7, 2005, the Tennessee General Assembly, in response to the United States Supreme Court case of *Blakely v. Washington*, amended Tennessee Code Annotated sections 40-35-102, -210, and -401 to reflect the advisory nature of enhancement factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. The amendment, among other things, removed the presumptive

sentence language from our Sentencing Act and mandated only that the trial “court shall impose a sentence within the range of punishment . . . .” *Compare* Tenn. Code. Ann. § 40-35-210(c) (Supp. 2005) with Tenn. Code Ann. § 40-35-210(c) (2003). The General Assembly also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. *See* 2005 Tenn. Pub. Act ch. 353, § 18. The legislature further provided that a defendant who is sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, may elect to be sentenced under the amended provisions of the Act by executing a waiver of ex post facto protections. *Id.* In the instant case, the defendant committed the offenses on March 25, 2004, and was sentenced on May 26, 2006. There is no waiver executed by the defendant in the record herein. Thus, the 2005 amendments to the Sentencing Act do not apply to the defendant.

In *Blakely v. Washington*, the United States Supreme Court held that the Sixth Amendment right to a jury trial requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The Court emphasized that the relevant statutory maximum “is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Id.* 303-04. The Court further noted that the Sixth Amendment right to a jury trial is “no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” *Id.* at 305-06.

Thereafter, in *Cunningham v. California*, the United States Supreme Court extended the *Blakely* analysis to California’s determinate sentencing scheme. In doing so, the Court noted:

We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

*Cunningham*, 127 S.Ct. at 869. Recently, in response to *Cunningham*, the Tennessee Supreme Court issued an opinion on remand from the United States Supreme Court in *State v. Gomez*, No. M2002-01209-SC-R11-CD, 2007 WL 2917726 (Tenn. Oct. 9, 2007) (*Gomez II*), which affects appellate review of a trial court’s application of enhancement factors to a defendant’s sentence if the sentence falls outside of the 2005 amendments to the Sentencing Act. On initial review of the sentencing issues in *State v. Gomez*, 163 S.W.3d 632, 650 (Tenn. 2005) (*Gomez I*), our supreme court concluded that the defendants were limited to plain error review of their sentencing claims regarding the Sixth Amendment due to their failure to preserve the issues for plenary review. In *Gomez II*, the court applied plain error review to defendant’s sentencing claims, then determined that in light of the *Cunningham* decision, a trial court’s enhancement of a defendant’s sentence on the basis of judicially determined facts other than the defendant’s prior convictions violates the

defendant's constitutional rights under the Sixth Amendment to the United States Constitution. *Gomez II*, 2007 WL 2917726, at \*3-6.

In the instant case, the state concedes that the trial court erred in applying enhancement factors other than prior convictions to increase the defendant's sentence for attempted especially aggravated robbery because these factors were neither found by a jury nor admitted by the defendant. However, the state argues that the defendant failed to raise a Sixth Amendment challenge to his sentence at the trial level; and therefore, the defendant's claim is limited to plain error review. We agree. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *see also Gomez II*, 2007 WL 2917726, at \*3-6.

"Plain error review extends only to a clear, conspicuous, or obvious error which affects the substantial rights of the defendant." *Gomez I*, 163 S.W.3d at 645 (citations omitted). The criteria for finding plain error are difficult to satisfy. We will not recognize plain error unless the following five factors are established:

(a) the record ... clearly establish[es] what occurred in the trial court; (b) a clear and unequivocal rule of law [has] been breached; (c) a substantial right of the accused [has] been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

*State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). All five factors must be established, and consideration of all five factors is unnecessary if any one factor indicates that relief is not warranted. *Id.* at 283. The defendant has the burden of persuasion regarding plain error claims. *U.S. v. Olano*, 507 U.S. 725, 734 (1993). In order for this court to find plain error, the error must be of such a great magnitude that it probably changed the outcome of the proceedings. *See Adkisson*, 899 S.W.2d at 642.

It is our view that the defendant has not carried his burden of demonstrating plain error. Specifically, the defendant has not shown that consideration of the court's sentencing error is necessary to do substantial justice. In the instant case, the trial court considered the defendant's past criminal convictions when enhancing the defendant's sentence. A trial court's application of criminal convictions to enhance a defendant's sentence does not violate the Sixth Amendment right to a jury as explained in *Blakely* and *Cunningham*. A trial court can properly consider a defendant's prior convictions when imposing sentence. *See Gomez II*, 2007 WL 2917726, at \*7. According to the defendant's presentence report, the defendant had a prior felony conviction for possession of drugs with intent to sell or deliver. In addition, the defendant had several prior misdemeanor convictions, including evading arrest, criminal trespassing, driving with a suspended license, and possessing a prohibited weapon. The court noted that although the record was not extensive, the defendant had only been an adult for two years and had committed a number of crimes within a short period of time. Because the defendant's prior criminal convictions allowed for the enhancement of

his sentence, we fail to discern how the court's imposition of the maximum twelve year sentence amounts to plain error. The defendant is not entitled to relief on this issue.

### ***Consecutive Sentencing***

The defendant next contends that the trial court erred in imposing consecutive sentences. Specifically, the defendant argues that the court trial did not make the requisite findings to support consecutive sentencing based on the defendant being a dangerous offender.

A trial court may impose consecutive sentencing upon a determination by a preponderance of the evidence that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. Therefore, pursuant to this code section, a trial court may impose consecutive sentencing if it determines any one of the following criteria applies:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). The criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing. However, if the trial court imposes consecutive sentencing based solely upon a finding that the defendant is a dangerous offender, the court must also determine whether the sentences imposed are reasonably related to the severity of the offenses and necessary to protect the public from further criminal activity by the defendant. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). Additionally, the trial court should consider general sentencing principles including whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See Imfeld*, 70 S.W.3d at 708. It is within the sound discretion of the trial court whether or not to impose consecutive sentences. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).



In ordering consecutive sentences, the trial court determined that the defendant was on probation for a felony drug offense at the time he committed the present offenses, and the defendant was a dangerous offender. Regarding its finding that the defendant was a dangerous offender, the court recounted how the defendant terrorized the McLaurine family, then noted the following:

I think the facts of this case are particularly egregious and aggravating. Not only did [the defendant] kill one person, but he terrorized the parents and killed [the victim] right in front of them, notwithstanding that they were offering him no resistance and were not otherwise in a position to defend themselves.

While no murders make sense, this one was just outrageous. The Court also finds that an extended period of time is necessary to protect society from the defendant's unwillingness to lead a productive life, and the defendant's resort to criminal activity and furtherance of an antisocial life style - - I mean, he never worked in his life. He hasn't done anything in his li[f]e except [be] a criminal.

He has had weapons before, and he doesn't mind having weapons again. He abuses drugs and has never tried to address [his addiction]. There is nothing in his Presentence Report, or that I heard at trial or otherwise, - - it says he worked at Wendy's and a couple of other fast food [places] but he never reported the dates so [his employment] was never verified. He has done nothing in his life to suggest that he has any interest in living in society on a lawful basis.

Finally, the Court finds that the aggregate length of the sentence reasonably relates to the offense in which the defendant stands convicted, for all the other reasons I have stated before.

In our view, the trial court's findings reflect that the court considered the sentencing principles and all relevant facts and circumstances required for the imposition of consecutive sentences. First, as the trial court pointed out, the defendant's presentence report shows that the defendant was placed on three years probation in 2003 for a felony drug offense, whereas, the instant offenses were committed by the defendant in 2004. This finding alone justifies consecutive sentencing. *See* Tenn. Code Ann. § 40-35-115(b)(6). Additionally, the court properly articulated his reasons for finding that the defendant was a dangerous offender, including why the sentences imposed reasonably relate to the seriousness of the offenses and are necessary to protect the public from further criminal activity by the defendant. Accordingly, the defendant is not entitled to relief on this issue.

## CONCLUSION

Based upon the foregoing review, we affirm the defendant's convictions and sentences.

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J.C. McLIN, JUDGE